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IN THE

Supreme Court of the United States

OCTOBER TERM, 1950.

No. 646

WILLIAM E. LEAHY, as Executor, Estate of Annie E. Kilroy, deceased,

v.

ROSE KALIS.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

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The petitioner, appellee below, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in the above entitled cause on January 31, 1951.

OPINIONS BELOW.

The judgment of the District Court is on page 6A of the record.

The opinion of the United States Court of Appeals for the District of Columbia Circuit is set forth at page 9 et seq. of the record.

JURISDICTION.

The judgment of the Court of Appeals was entered on January 31, 1951. (R. 13)

The jurisdiction of this Court is invoked under *28 U. S. C. 1254(1)*.

QUESTION PRESENTED.

Whether the *Act of Congress of June 24, 1949, Ch. 242, 63 Stat. 240, U.S. Code, Congressional Service 1949, Vol. 1, 269,* reducing the period of limitations in matters concerning the administration of decedents estates in the District of Columbia applies to a claim filed against the estate of a decedent on October 3, 1949 and rejected by the executor on October 27, 1949, notwithstanding the decedent died September 19, 1948 and her will was admitted to probate October 5, 1948.

STATUTE INVOLVED.

31 Statute 1245, Ch. 854, Sec. 348, Title 18, Sect. 518, D. C. Code 1940, as amended by Public Law 125, approved June 24, 1949, 63 Stat. 240, U. S. Code Congressional Service 1949, Vol. 1, 269, 270.

Original Statute (Title 18, Sec. 518, D. C. Code, 1940)	Amendment of June 24, 1949
"If a claim be exhibited against an executor or administrator which he shall think it his duty to dispute or reject, he may retain in his hands assets proportioned to the amount of the claim, which assets shall be liable to other claims, or to be delivered up or distributed in case the claim be not established; and if on any claims exhibited and disputed as aforesaid the creditor or claimant shall not, within *nine* months after such dispute or rejection, commence a suit for re-	Sec. 5, Section 348 of said Act approved March 3, 1901 (title 18, sec. 518, D. C. Code, 1940, lines 9, 15, and 19), is amended by striking out the words "*nine months*" where they appear three times in said section and inserting each time in lieu thereof the words "*three months*". (Emphasis ours)

covery the creditor shall be forever barred; and the executor or administrator may plead this section in bar, together with the general issue or other plea proper to bring the merits of the cause to trial; and on any dividend to be made *nine* months after such dispute or rejection and failure to bring suit the executor or administrator may proceed to pay or distribute as if he had not knowledge or notice of such claim or as if it did not exist; but if the claim be put in suit within the *nine* months it may be ascertained by verdict or otherwise, and the court shall proceed as herein directed, regard being had to the rules herein laid down as to the notice to be given by the executor or administrator and distribution or payment be made after such notice." (Emphasis ours)

STATEMENT OF THE CASE.

On September 19, 1948 the decedent died.

On October 5, 1948 her will was admitted to probate and petitioner qualified as executor.

On June 24, 1949 the statute reducing the period for bringing suit on claims rejected by a fiduciary from nine (9) to three (3) months became law.

On October 3, 1949 the respondent filed her claim against the decedent's estate for services rendered as companion and nurse. (R. 7A)*

On October 27, 1949 the executor rejected the claim pursuant to statute (*Title 18, Section 518 D. C. Code as amended, supra.*)

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* This is not recited in the chronology of events related in note two of the opinion of the Court below. It is in the record page 7A.

On May 12, 1950, which was more than the three (3) months limitation period provided by the new statute but less than the nine (9) months period provided in the old statute, suit was instituted by the respondent here, plaintiff in the District Court.

The District Court dismissed the suit on the ground the later statute governed and hence the claim was barred by limitations.

The Court of Appeals held the prior statute was applicable. It stated the answer to the question was not clear.

REASONS FOR GRANTING THE WRIT.

The opinion of the Court below is in conflict with the decisions of the Fourth Circuit as announced in *The Fred Smartely, Jr.*, v. *Penn. Sugar Co., 108 F(2)* 603 and *Johanna Cotton Mills* v. *National Labor Relations Board, 176 F(2) 749, 754.* It also conflicts with *United States* v. *Union Planters National Bank (CCA 5th 1949) 175* F(2) *685.*

The decision of the Court below involves the construction of a statute. The Court in its opinion indicated the answer to be dubious. It specifically stated the answer was not clear. The statute is a substantial and important one involving the administration of estates. There, possibly more than in any branch of the law, statutes should be clear or made so by the judiciary. The ruling below constitutes a precedent of general application and can be most important in matters affecting administrative law. cf. *The Fred Smartley, Jr.* v. *Penn Sugar Co., 108 F(2) 603, and Johanna Cotton Mills* v. *NLRB, 176, F(2) 749.*

ARGUMENT.

I.

We believe the District Court was right in ruling that the statute of limitations, in effect at the time the claim was filed and similarly in effect at the time of rejection of the

claim by the executor, determined the disposition of the suit filed against the executor by the plaintiff. We submit the Court of Appeals was wrong in holding to the contrary.

We believe the District Court was right when it sustained a plea of limitations interposed by the executor of decedent's estate to the suit filed on May 12, 1950 by respondent for services as companion and nurse rendered by the respondent to decedent. The new statute of limitations, relied on by petitioner, became law on June 24, 1949.

The local law (*Title 18, Sect. 502, et seq., D. C. Code 1940*) permits creditors to file a claim against a decedent's estate if legally authenticated. Filing and presentation constitutes notice to the executor of the claim. (*Title 18, Sect. 513*). Indeed, it is in the nature of an attachment before judgment. Should the executor reject the claim, he must retain sufficient assets to secure its payment until expiration of the time provided by statute for the creditor to institute suit.

As the Court below said:

> "The effect is that if a claimant desires the executor to hold assets for his claim he must follow this special procedure. Otherwise, he may sue within 3 years." (Page 1 of opinion below. R. 9)

Although the decedent died September 19, 1948 and her executor qualified October 5, 1948, respondent did not file a claim against decedent's estate until October 3, 1949. This was almost four (4) months after the statute went into effect. By filing her claim, respondent selected the remedy which had the effect of an attachment before judgment without bond. If rejected, the claimant had to sue, under the statute of June 24, 1949, within three (3) months. The claim was rejected October 27, 1949, approximately four (4) months after enactment of the pertinent statute. We submit respondent's remedy was governed by the statute in force at the time of rejection on October 27, 1949.

It cannot be denied that any case arising subsequent to June 24, 1949 would be governed by the new statute. Here, although the plaintiff could have filed her claim and thus impounded funds in the hands of the executor sufficient to satisfy her claim at any time after his qualification on October 5, 1948, she failed to do so until several months after the passage of the new statute. Her claim was promptly rejected within the month of filing. After rejection of her claim, the attachment or impoundage of funds in the executor's hands remained in effect for three (3) months in order to give her an opportunity to sue (*Title 18, Sect. 518, D. C. Code 1940*). Statutes of limitation affect only the remedy and not her right to sue. For that reason, it is submitted her remedy was governed by the statute in force at the time of rejection of the claim by the executor.

This Court held in *Terry* v. *Anderson, 95 U. S. 628, 24 L. Ed. 365,* that, if a reasonable time is given before the bar takes effect, statutes reducing the limitation period are valid.

It cannot be gainsaid that the time allowed the claimant to institute her action is unreasonably short under the new statute for the very obvious reason that such reduced period is the maximum allowed in all cases arising since its enactment. Be it remembered that the plaintiff could sue without filing or probating her claim at any time within three (3) years of the accrual of her cause of action. *Clawans* v. *Sheets, 92 F(2) 517, 67 App. D.C. 366.* However, she would not have the benefit of sequestering the funds, as she has in the procedure adopted by her. This is a very valuable right. She did not have to allege facts within the purview of the statute permitting attachment before judgment (*Title 16, Section 301, D. C. Code (1940)*. She did not have to post bond for twice the amount of the claim to indemnify the defendant for all costs and damages. Consequently, having proceeded under the more favorable statute, she is burdened with the shorter period of limitations.

The statute relied upon by petitioner was in effect at the time she filed her claim and its subsequent rejection. It had been for some months prior thereto. It limited her time to sue on her rejected claims to three (3) months. She did not sue for six and one half (6½) months. Suit came too late.

We invite the Court's attention to a general treatise on statutes shortening the time in which to file claims against a decedent's estate, set forth in *117 ALR 1208*. On *page 1210* we find...

> "However, it was held, in E. S. Parks Shellac Co. v. Jones (1928) 265 Mass. 108, 163 N.E. 883, that the presumption against retroactiveness did not apply to a statute shortening the time for summoning in an executor to defend an action originally brought against his testator. And in so holding, the court referred, for the reasons for such exception, to *Mulvey* v. *Boston* (1908) 197 Mass. 178, 83 N.E. 402, 14 Ann. Cas. 349, stating that it had been therein held that the principle as to presumption was not applicable to a statute shortening the period of limitation for bringing an action, provided a reasonable time is allowed within which an action may be brought after the enactment of the statute. In the latter case, on facts not within the scope of the annotation, it was said: 'In ascertaining the meaning of statutes, it is a general rule that they are intended to operate prospectively and not retroactively. It follows, therefore, that in the absence of an express provision to that effect, they do not relate back, to change previously existing substantive rights of property. Most such rights cannot constitutionally be affected by legislation. *But in the prospective operation of a statute which deals only with remedies and the enforcement of rights, the future procedure under the new legislation is as applicable to previously existing substantive rights as to those afterwards acquired. Statutes of limitation relate only to the remedy, and they control future procedure in reference to previously existing causes of action.* This is the general rule in regard to such statutes, where they contain no language clearly limiting their application to causes of action arising in the future.' " (Italics ours)

The converse of a statute such as the instant one is discussed in the case of *Condon* v. *Haitsma* (S. Judicial Ct. Mass., Suffolk, 1950) 90 N.E. (2) 549. There an action was instituted for attorney's fees rendered to an estate and earned prior to January 1, 1947. The suit was filed January 27, 1949. Prior to January 1, 1947 the statute of limitations for services rendered, as legal representative of an estate, was one year. After January 1, 1947 an act was passed increasing the period of limitations for services rendered. The Court held that the claim was good and not subject to the statute of limitations. It said:

> "There can be no objection to the result we arrive at because the services for which payment is sought were rendered and incurred prior to the effective date of section 39A—G.L. (the statute involved). This statute related only to the remedy and procedure in collecting a claim and affected no substantial rights so that it may be said to operate retroactively."

II.

CONFLICT BETWEEN THE DECISION BELOW AND OTHER CIRCUITS.

The opinion below is in conflict with the decisions of the Fourth Circuit announced in the case of *The Fred Smartley, et al.* v. *Penn Sugar Co., 108 F(2) 603 and Johanna Cotton Mills* v. *National Labor Relations Board, 176 F(2) 749, 754.* The former was a maritime case for damages to cargo which was shipped in November, 1935. Liability was claimed because of the unseaworthiness of the vessel at the inception of the voyage. On April 18, 1936 the shipper filed written claim of loss with the owner. On August 13, 1936 a libel to recover damage was filed. Judgment was obtained March 19, 1938.

In June 1936 Congress passed a statute of limitations restricting to six (6) months after written notice of claim the period during which the owner might petition for limitation of liability.

A petition for limitation of liability was filed March 11, 1939. It was denied because the petition was not filed in the time required by statute.

On April 18, 1936, at the time the shipper filed written claim of loss, there was no statute relative to limitation of liability. The owner of the vessel could, before or after judgment, file a proceeding to limit liability. In holding the claim barred, the Court said: Page 607

> "Where claims had not been filed, the six months period would run from the filing of the first claim, just as in cases where liability accrues after the passage of the statute. Where as here claim had been filed, the six months period would run from the passage of the act."

Finally, the Court said: Page 608

> "If liability had accrued prior to the passage of the act but no claim had been filed prior thereto, it would seem clear that the statute should be construed to limit the filing of petition to six months after the filing of claim."

In the *Johanna case, the Labor Management Relations Act of June 23, 1947, 29 U.S.C. Sec. 160,* provided that no matter of alleged unfair labor practices could be considered by the National Labor Relations Board unless complaint was made within six (6) months after its occurrence. In 1947 a labor Union filed a complaint alleging unfair labor practices. The exact date in 1947 is not given in the opinion. In June 1947 the statute went into effect and provided for a six (6) months limitation. On February 13, 1948 an amendment was made to the complaint by the Union asserting that an unfair labor practice occurred in October 1946. At the hearing the board considered the complaint of the October 1946 unfair labor practice. This, of course, occurred prior to the Act and without the six (6) months limitation period. The Court said: *Page 754*

> "And we think, also, that the charge is barred by limitations. *Section 10(b) of the Labor Management Relations Act, 29 U.S.C.A. § 160(b)*, specifically provides that 'no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made'. We agree that the six months, as applied to the charge here, runs from the date when the statute became effective. See *The Fred Smartley, Jr., 4 Cir., 108 F. 2d 603, 607.* The trouble, however, is that no charge relating to discharge for engaging in concerted activities, as distinguished from union activities, was served upon the company until more than six months had elapsed after the act had become effective."

Analyzing the above cases, it will be seen that both occurrences, which were the basis of the litigation, took place prior to the enactment of the statute. In both cases, however, the court held the statutes of limitation, enacted subsequent thereto, to be applicable.

In the instant case, neither the claim nor the suit thereon, after its rejection, began until after the enactment of the statute. We submit the time for institution of suit should be computed from the date of the passage of the statute. (*The Fred Smartley, supra.*)

Of interest also is the case of the *United States* v. *Union Planters Nat. Bank (CCA 5th, 1949)175 F(2) 685.* There, the United States sued several banks to recover on guarantees upon prior endorsements of checks, drawn on the Treasurer of the United States. Suit was based upon the fact that the endorsements on the checks were not made by the payees but were forgeries. The defendants moved for summary judgment on the ground that the suit was barred by the *Act of March 6, 1946, 31 U.S.C. Secs. 129-131,* which provided:

> " 'That no proceeding in any court shall be brought * * * unless such proceeding is commenced within six years after presentation to the Treasurer * * * or un-

less within that period written notice shall have been given by the United States * * * ',"

"'Unless a court proceeding shall have been brought or such notice given within the period prescribed herein, any claim against such endorser * * * shall be forever barred.'"

The Court of Appeals for the Fifth Circuit held that suit was not pending when the Act was passed, nor was notice given within six years. The Court of Appeals sustained the District Court and held that the statute, even though enacted subsequent to the origin of the cause of action, was a bar to bringing the suit. At the time the banks guaranteed the forged signatures, there was no statute. In the instant case, at the time the respondent filed her claim on October 3, 1949 and sued thereon after its rejection on October 27, 1949, the statute had been in effect since June 24, 1949. The statute in the bank case provided that after the period prescribed the

"claim shall be forever barred."

In the present case, the statute, at the time of the filing of the claim and its rejection, provided:

"If on any claim disputed the claimant shall not, within three months after dispute or rejection, commence a suit for recovery, *the creditor shall be forever barred.*" (Emphasis ours)

CONCLUSION.

The conflict resulting from the decision below with the Fourth and Fifth Circuits should be resolved by this Court.

It is respectfully submitted that this writ should be granted.

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